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SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 31700 (Sub-No. 13)

CANADIAN PACIFIC LIMITED, ET AL.--PURCHASE AND
TRACKAGE RIGHTS--DELAWARE & HUDSON RAILWAY COMPANY

(ARBITRATION REVIEW)

Decided: September 17, 1998

This proceeding involves appeals by the American Train Dispatchers Department of the International Brotherhood of Locomotive Engineers (Train Dispatchers or petitioners) of an arbitrator's decisions: (1) approving the transfer by Canadian Pacific Railway Company (Canadian Pacific) of five Delaware & Hudson Railway Company (Delaware & Hudson)[1] dispatch positions from Milwaukee, WI, to Montreal, Quebec, Canada; and (2) imposing an implementing agreement to effectuate the transfer.[2] The Train Dispatchers ask that we review and set aside the arbitrator's decisions. Petitioners maintain that the arbitrator lacked jurisdiction over the transfer and failed to give adequate consideration to safety. Applying the standard for review of arbitrators' decisions, and in accordance with the Board's policy of promoting negotiation and arbitration in labor matters and of reviewing arbitration decisions only under limited circumstances, we decline to review the decisions.[3]

BACKGROUND

In 1990, in Finance Docket No. 31700, the Interstate Commerce Commission (ICC) approved an application by Canadian Pacific Limited (CPL) (now Canadian Pacific), and its then newly-created subsidiary D&H Corporation, to acquire substantially all of the rail operating assets

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[1] We will refer to Canadian Pacific and Delaware & Hudson collectively as "the carriers."

[2] The awards resulted from arbitration between the parties conducted pursuant to Article 1, section 4, of the protective conditions set out in New York Dock Ry.-Control-Brooklyn East, Dist., 360 I.C.C. 60 (1979), aff'd sub nom. New York Dock Ry. v. U.S., 609 F.2d 83 (2d Cir. 1979) (New York Dock).

[3] In a decision served June 16, 1998, the Chairman stayed the effectiveness of the arbitral awards and orders pending further Board action. The stay remains in effect until the effective date of this decision.

of the bankrupt former Delaware & Hudson.[4] In approving the application, the ICC imposed New York Dock labor protective conditions. Two years later, Delaware & Hudson moved its dispatching functions from Schenectady, NY, to Milwaukee, contracting with the Soo Line Railroad Company (Soo), another Canadian Pacific subsidiary, to take over the dispatching function. Delaware & Hudson abolished the dispatcher jobs in Schenectady.[5]

In April 1996, Canadian Pacific created a new subsidiary, the St. Lawrence & Hudson Railway Company (St. Lawrence), to operate Canadian Pacific's lines in eastern North America, including both Canada and the United States. Beginning in June 1996, Canadian Pacific notified the Train Dispatchers in a series of letters that the five Delaware & Hudson dispatcher jobs would be moved from Milwaukee to Montreal, Quebec, and indicated that the transfer of the dispatching functions from Milwaukee to Montreal accorded with the labor conditions imposed in CPL/DHRC. Canadian Pacific stated that, for operating purposes, it would be necessary for St. Lawrence to manage its own train dispatching functions, and for the dispatching of Delaware & Hudson trains to be handled by St. Lawrence's facility in Montreal.

The Train Dispatchers challenged the carriers' right to effectuate the transaction. The parties then attempted to negotiate an implementing agreement under the New York Dock conditions. Their efforts proved unsuccessful and the matter was submitted to arbitration. The Train Dispatchers argued before the arbitrator that he lacked the authority to impose an implementing agreement because the proposed transaction had not been authorized by the ICC. In the Train Dispatchers' view, the transfer was not encompassed within the authority the ICC granted in CPL/DHRC.

In a decision entered on October 13, 1997, the arbitrator ruled that, pursuant to the authority conferred by the ICC, the carriers are, in fact, authorized to coordinate Delaware & Hudson's train dispatching work with the train dispatching work of Canadian Pacific's other eastern railroad affiliate, St. Lawrence, and to transfer that work to Canada. The arbitrator directed the parties to make and consummate an implementing agreement, which he said must contain certain specified provisions.[6] The arbitrator retained jurisdiction in the event the parties could not agree on the

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[4] Canadian Pacific Ltd.-Pur. & Trackage-D&H Ry. Co., 7 I.C.C.2d 95 (1990) (herein, CPL/DHRC).

[5] The carriers and the Train Dispatchers reached an implementing agreement that provided that the Delaware & Hudson dispatchers could transfer their seniority to Soo's operations. Of the original six Delaware & Hudson dispatchers who relocated to Milwaukee, two continue to perform Delaware & Hudson dispatching services, while the others have left the carrier's employment.

[6] These provisions were: (1) employees are eligible to follow, on a seniority basis, the transferred work; (2) the carrier is obligated to make "reasonable, meaningful, and diligent" efforts to overcome Canadian restrictions on immigration and/or collective bargaining considerations; and (3) moving expenses will be provided for pursuant to section 9 of New York Dock.

precise language of the implementing agreement.

The parties were not able to agree on an implementing agreement, and they subsequently submitted statements to the arbitrator. On May 28, 1998, the arbitrator issued a second award in which he revised the carrier's proposed agreement, and adopted the agreement, thus revised, as the implementing agreement.

In the meantime, on September 23, 1996, CPL, Canadian Pacific, St. Lawrence, and a Canadian Pacific subsidiary, Napierville Junction Railway Company, Ltd., had jointly filed a verified notice of exemption under 49 CFR 1180.2(d)(3) indicating that Canadian Pacific intended to transfer its interest in certain U.S. rail assets to St. Lawrence.[7] St. Lawrence was to become a carrier upon consummation of the transaction.

A notice in STB Finance Docket No. 33136, served and published on October 9, 1996 (61 FR 52994), set forth the terms of the transaction. The notice stated that the proposed transaction was "part of an internal reorganization" and was "designed to improve services and financial performance by realigning [Canadian Pacific's] railroad operating units and by consolidating duplicate functions, primarily at the managerial and administrative levels." The transfer of dispatching functions from Milwaukee to Montreal was contemplated as part of the transaction.

The Train Dispatchers petitioned for revocation of the exemption, arguing that the transfer of dispatching functions from Milwaukee to Montreal contemplated by the transaction constituted a "major operational change" that rendered the involved corporate simplification transaction ineligible for the class exemption. In a decision served January 13, 1998, we denied the petition to revoke.[8] We declined to address the question of whether the labor issues underlying the petition were the direct result of the notice of exemption or, rather, were the result of the decision in CPL/DHRC, finding that the question was not relevant to the issue raised in the petition to revoke.

By pleadings filed on October 23, 1997, April 9, 1998, and June 4, 1998, the Train Dispatchers seek review of the arbitrator's decisions. The carriers have replied to the pleadings.

The Train Dispatchers base their appeals on what they argue is the arbitrator's erroneous conclusion that the proposed transfer transaction falls within the scope and authority of the decision in CPL/DHRC. The Train Dispatchers assert that the 1990 approval did not, in fact, encompass the

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[7] Section 1180.2(d)(3) governs intracorporate transactions that "do not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family."

[8] Canadian Pacific Limited, Canadian Pacific Railway Company, and Napierville Junction Railroad Company--Corporate Family Transaction Exemption--St. Lawrence & Hudson Railway Company Limited, STB Finance Docket No. 33136 (STB served Jan. 13, 1998).

transfer proposal, which has not otherwise been approved by the ICC or by this agency.[9] Therefore, according to petitioners, the arbitrator exceeded his authority in finding otherwise and in proceeding to approve an implementing agreement covering the transaction.

In addition, the Train Dispatchers argue that the transfer of the dispatching function raises safety issues. Petitioners assert that the Federal Hours of Service Act and U.S. drug and alcohol testing requirements and other protections against the abuse of drugs and alcohol would not apply to the dispatchers in Montreal. This, the Train Dispatchers say, raises issues concerning the effect on safety of the removal of train dispatching from the authority of U.S. Federal regulatory agencies, including the Federal Railroad Administration (FRA).[10] The Train Dispatchers contend that the FRA has contacted Canadian Pacific and has objected to the proposed transfer of dispatchers. In support, petitioners submit a copy of a letter of March 25, 1998, to Canadian Pacific from FRA Director of the Office of Safety Assurance and Compliance, Edward R. English. In the letter, Director English expresses his concern with the difficulty of enforcing hours of service and alcohol and drug requirements of Rail Traffic Controllers who control the movement of traffic in the U.S. from stations in Canada.

The carriers reply that the arbitrator correctly found that the proposed transaction is within the authorization conferred in CPL/DHRC. The involved coordination of operations, the carriers assert, was clearly contemplated by the ICC's decision. The fact that the decision did not expressly anticipate or describe the coordination of dispatching functions per se, the carriers argue, does not mean that the proposed transaction is not authorized.

Regarding the Train Dispatchers' safety concerns, the carriers indicate that they have been in communication with the FRA, and they submit a copy of extensive documentation prepared for, and filed with, the FRA in response to that agency's inquiries. The carriers state that, in most respects, Canadian and U.S. regulatory requirements are complementary, and that the carriers intend to comply with the highest standards under both regimes. In the case of hours of service regulations, the carriers have agreed to limit dispatchers' shifts in accordance with FRA regulations, even though Canadian regulations would permit the dispatchers to work longer shifts. The carriers acknowledge that Canadian human rights standards limit their ability to compel employees to submit to drug and alcohol testing to the same extent permitted by U.S. law. However, the carriers aver that they are committed to enforcing their operating rules in connection with dispatching work to the fullest extent

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[9] Petitioners argue that the notice of exemption filed in STB Finance Docket No. 33136 in 1996 is evidence that the authority granted in CPL/DHRC was not broad enough to encompass the proposed transfer of dispatching operations to Canada. The carriers respond, however, that they invoked the class exemption in STB Finance Docket No. 33136 merely to cover those few elements of the Canadian Pacific reorganization that implicated the Board's jurisdiction,

[10] The Train Dispatchers also raised this issue in their petition to revoke the carriers' notice of exemption in STB Finance Docket No. 33136 that was discussed above.

permissible under Canadian law. The carriers add that, on their own initiative, they have proposed a new set of regulations that would require periodic medical assessments of employees, including dispatchers, in sensitive positions. According to the carriers, the new procedures would exceed current FRA requirements for periodic vision and hearing examinations and for the random drug testing program.

DISCUSSION AND CONCLUSIONS

The standard of review for arbitration decisions is set forth in the ICC's decision in Chicago & North Western Tptn. Co.-Abandonment, 3 I.C.C.2d 729 (1987) (Lace Curtain), aff'd sub nom. International Broth. Of Elec. Workers v. I.C.C., 862 F.2d 330 (D.C. Cir. 1988). Under the Lace Curtain standard, we do not review "issues of causation, the calculation of benefits, or the resolution of other factual questions," and our review is limited to "recurring or otherwise significant issues of general importance regarding the interpretation of our labor protective conditions." Id. at 735-36.

The Train Dispatchers do not address whether there are issues of general transportation importance here regarding the interpretation of our labor protective conditions. However, in the past, we have considered whether the interpretation is a matter of first impression, the number of affected employees, or the likelihood that the circumstances would recur as part of our analysis under this part of the Lace Curtain standard. Here, the transaction will affect a small number of employees, and petitioners have not argued or established that the matter is one of first impression or that it is likely to recur.[11]

An arbitrator's decision on the issue on which petitioners principally rely, i.e., whether the proposed changes are linked to a prior transaction, is a factual issue. That decision should not be set aside except for egregious error. See CSX Corporation--Control--Chessie System, Inc. and Seaboard Coast Line Industries, Inc., et al., Finance Docket No. 28905 (Sub-No. 26) slip op. at 8 (STB served Apr. 29, 1996), aff'd sub nom. United Trans. Union v. STB, 114 F.3d 1242 (D.C. Cir. 1997). The Train Dispatchers have not shown that the arbitrator's factual determination regarding the relationship between the proposed changes in dispatching and the transaction approved by the

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[11] See, e.g., The Bay Line Railroad, L.L.C.--Acquisition and Operation Exemption--Rail Lines of Atlanta & St. Andrews Bay Railroad Company, STB Finance Docket No. 32435 (Sub-No. 1) (STB served Sept. 3, 1997, pet. for recon. denied in STB decision served Dec. 30, 1997), Sept. 3 decision at 4 (declining to accept railroads' request for review of arbitration award where it was not shown that the arbitral decision had a broad impact or was likely to have continuing significance); CSX Corporation--Control--Chessie System, Inc., and Seaboard Coast Line Industries, Inc., et al., Finance Docket No. 28905 (Sub-No. 25) (ICC served Jan. 4, 1994) at 3 (declining to consider railroad's request to vacate award involving rights of six employees under agreement that had been terminated); Grand Trunk Western Railroad--Merger--Detroit and Toledo Shore line Railroad, Finance Docket No. 29709 (Sub-No. 1) (ICC served Aug. 19, 1991) at 5 (declining to review arbitration award based on finding that the circumstances were unique and not likely to recur).

ICC in CPL/DHRC constitutes egregious error. Therefore, there is no basis under Lace Curtain for us to review this factual issue raised by petitioners, or the issue of whether the arbitrator exceeded his authority which flows from it.

We find no merit in petitioners' claim that the arbitrator here exceeded his authority. Specifically, the record indicates that the arbitrator examined the transactions approved both in CPL/DHRC and in STB Finance Docket No. 33136. He noted the ICC's observation in the former proceeding that Delaware & Hudson "will be fully integrated into CP Rail System, both operationally and financially." CPL/DHRC at 99, n.7. The arbitrator also stated that the creation of a new corporate entity, St. Lawrence, did not change or undermine in any meaningful way the fact that the transfer of work is a manifestation of Canadian Pacific's intention, approved by the ICC, to operationally integrate Delaware & Hudson and Canadian Pacific into a single system. Under that analysis, the arbitrator concluded that the transfer of the dispatching function falls within the scope and authority of CPL/DHRC and, thus, he had jurisdiction to consider the carriers' proposal for an implementing agreement providing for the transfer of the dispatching function from Milwaukee to Montreal.

The Train Dispatchers' argument, that an event cannot be deemed "reasonably related" to an authorization unless it is mentioned in the agency decision, has been resolved adversely to petitioners' position in CSX Corp. Control-Chessie and Seaboard C.L.I., 8 I.C.C.2d 715 (1992), at 720-21, aff'd, American Train Dispatchers Ass'n v. I.C.C., 26 F.3d 1157 (D.C. Cir. 1994). In authorizing transactions, the ICC did not, and the Board does not (and could not), list all the actions expected to flow from the authority conferred. The lack of any statement that dispatcher positions would be transferred to Canada in CPL/DHRC does not mean that the transfer transaction is not directly related to, or does not grow out of, the primary transaction authorized.

The Train Dispatchers also have stressed the issue of safety, in particular, the effect of moving the dispatching function for U.S. lines to Canada. But the arbitrator found that the instant proposal is encompassed within the approval granted in CPL/DHRC, and we defer to the arbitrator on that factual finding. The implementing agreement imposed by the arbitrator is consistent with the New York Dock conditions the ICC imposed upon that approval. We would, therefore, in effect be retroactively imposing additional labor conditions on that approval were we to overturn his awards on the basis of safety issues.

More importantly, however, the record demonstrates that petitioners' concerns in this area have been adequately addressed.[12] The FRA, the agency having primary responsibility over railroad safety enforcement, has been made aware of the proposed transfer of dispatch positions and has been in contact with Canadian Pacific regarding the proposal. Moreover, the railroads have submitted a copy of a substantial filing they made with the FRA on this matter. The filing details Canadian

[12] We note that safety concerns raised by petitioners were a key factor in the Chairman's decision to stay this matter pending Board consideration of these appeals.

Pacific's safety compliance plans for the Montreal-based dispatch operation. As previously noted, the railroads have undertaken to comply with the highest standards under both Canadian and U.S. safety regulatory regimes. We will hold them to their representations. In these circumstances, the petitioners' safety concerns do not furnish a legal basis for reviewing the arbitrator's decisions.

In sum, having considered the applicable standard for review of arbitrators' decisions, we decline to review the decisions at issue in this proceeding.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. We decline to review the arbitrators' decisions.

2. This decision is effective 30 days after its service date.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary